JUN 29 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1951**

---

# No. 157

---

RAYMOND TERRIO,

*Petitioner,*

*versus*

THE UNITED STATES OF AMERICA,

*Respondent*

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.**

---

SAM R. MERRILL,
*725 Bankers Mortgage Bldg.,*
*Houston 2, Texas,*
*Attorney for Petitioner.*

PHILIP D. BEALL and
MERRILL & SCOTT,
*Of Counsel.*

# INDEX

## Subject Index


| | Page |
|---|---|
| Petition for writ of certiorari | 1 |
| Summary | 1 |
| Jurisdiction | 2 |
| Questions presented | 3 |
| Statement | 4 |
| Specifications of errors to be urged | 5 |
| Reasons for granting the writ | 6 |
| Conclusion | 9 |
| Brief in support of petition | 11 |
| Opinions of the courts below | 11 |
| Jurisdiction | 11 |
| Statement of the case | 12 |
| Specification of errors | 14 |
| Argument | 15 |
| Summary | 15 |


## Table of Cases Cited


| | |
|---|---|
| *Acuna* v. *United States*, 74 F. (2d) 359 | 24 |
| *Blockburger* v. *United States*, 284 U. S. 299, 76 L. Ed. 306 | 9, 25 |
| *Bruno* v. *United States*, 164 F. (2d) 693 | 26 |
| *Casey* v. *United States*, 276 U. S. 413, 72 L. Ed. 632 | 8, 24 |
| *Clark* v. *State*, 117 Cr. R. 153, 35 S. W. (2d) 420 | 20 |
| *Clyatt* v. *United States*, 197 U. S. 207, 49 L. Ed. 726 | 25 |
| *Copperthwaite* v. *United States*, 37 F. (2d) 846 | 9, 26 |
| *Edenfield* v. *United States*, 112 F. (2d) 931 | 25 |
| *Frazier* v. *United States*, 163 F. (2d) 817 | 24 |
| *Heath* v. *Boyd*, 175 S. W. (2d) 214 | 20 |
| *Hood* v. *United States*, 78 F. (2d) 150 | 23 |
| *Howard* v. *United States*, 75 F. (2d) 562 | 22 |
| *Johnson* v. *United States*, 333 U. S. 10, 92 L. Ed. 436 | 7, 20 |
| *Michener* v. *United States*, 331 U. S. 790, 91 L. Ed. 1818 | 9, 25 |

Page

*Tot* v. *United States*, 319 U. S. 463, 87 L. Ed. 1519 .... 8, 23
*United States* v. *Di Re*, 332 U. S. 581, 92 L. Ed. 210 .. 7, 20
*United States* v. *Moe Liss*, 105 (2d) 144 ..... 23
*Yee Hem* v. *United States*, 268 U. S. 178, 69 L. Ed. 904 ..... 8, 23

STATUTES CITED

Code of Criminal Procedure of Texas:
Article 212 ..... 18, 20
Article 215 ..... 18
Article 325 ..... 19, 20

Constitution of the United States:
Article III, Sec. 2, cl. 3 ..... 3, 19, 25
Amendment IV ..... 3, 7, 19
Amendment VI ..... 3, 19, 25
Amendment V ..... 19

Federal Rules of Criminal Procedure, Rule 18 ..... 18

Title 21, U. S. Code:
§ 174 ..... 2, 8, 12, 18, 22, 25
§ 181 ..... 18, 23

Title 26, U. S. Code:
§ 2553 ..... 8
§ 2553(a) ..... 2, 12, 17, 22, 24
§ 2554(a) ..... 2, 12

Title 28, U. S. Code:
§ 1254 ..... 2, 12

TEXTS CITED

62 Corpus Juris 834 ..... 22
4 Texas Jurisprudence 743, Arrest § 5 ..... 20

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1951**

---

# No. 157

---

RAYMOND TERRIO,

*Petitioner,*

*versus*

THE UNITED STATES OF AMERICA,

*Respondent*

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

---

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner respectfully shows:

I

**Summary**

Petitioner Raymond Terrio and one James Jeffrey Brown were indicted in the United States District Court for the Southern District of Texas on three counts alleging *First,* a conspiracy by them to commit offenses against

the United States of America as follows (a) Violations under Section 2553(a), Title 26, U. S. Code, and (b) Violations under Section 2554(a), Title 26, U. S. Code, *Second*, a purchase by them of heroin in Houston, Harris County, Texas, not in or from the original stamped package, violating Sec. 2553(a), Title 26, United States Code, and *Third*, that in Houston, Harris County, Texas, they fraudulently and knowingly received, concealed, bought, sold and facilitated the transportation of heroin, after importation, knowing the same to have been imported into the United States contrary to law, violating Sec. 174, Title 21, U. S. Code.

Petitioner and his co-defendant timely moved to suppress evidence (R. 5), which was overruled, and renewed objection at trial (R. 95), which was overruled. Petitioner then and now contends that evidence procured by a search without warrant incident to an unlawful arrest without warrant was in violation of his constitutional rights. The possession of heroin on his person revealed by such arrest and search was relied upon by the prosecution and constitutes the only evidence relied on by the prosecution to support a verdict of guilty on Counts 2 and 3 of the indictment. Appellant was acquitted on Count 1 and his co-defendant on all counts.

There was no opinion by the District Court and the Court of Appeals affirmed Per Curiam without opinion.

## II

### Jurisdiction

The judgments below was rendered on April 25, 1951, motion for rehearing, timely filed, was overruled on the 30th day of May, 1951. (R. 154-156).

The jurisdiction of this Court is invoked under Sec. 1254 of the Judicial Code as amended June 25, 1948 (28 USCA § 1254).

## III

### Questions Presented

1. The constitutional guaranties of the Fourth Amendment to the Constitution of the United States securing to its citizens the right to privacy and personal security was violated by an unlawful arrest and search, and the evidence procured thereby should have been suppressed.

2. Due process of law as guaranteed to its citizens by the 5th Amendment to the Constitution of the United States is denied where a statutory presumption is indulged to provide the only evidence of a material, essential element of a crime charged, when the prosecution by its own evidence has affirmatively disclosed that such element did not, or probably did not, exist, such that Count II of the indictment alleging purchase in Houston, Harris County, Texas, was unsupported by any evidence of venue absent such presumption so unlawfully indulged and petitioner's constitutional right to trial in the State where the crime shall have been committed as contained in the Constitution of the United States, Article III, Section 2, paragraph 3, and in Amendment VI thereof, was denied him, and such that Count III of the indictment alleging unlawful concealment, etc., of heroin, after its unlawful importation, knowing the same to have been imported contrary to law, was unsupported by any evidence of its unlawful importation or of petitioner's knowledge, absent such presumption so unlawfully indulged.

3. An unlawful double punishment results where a single act, lawful in itself, is made sufficient proof of two different crimes by the indulgence of separate statute-created presumptions, and reversible error is presented when punishment for conviction of two such crimes is made cumulative.

## IV

### Statement

A. *The Unlawful Arrest.* Petitioner filed Motion to Suppress Evidence (R. 5-6), and after hearing the evidence thereon, the District Court overruled it (R. 46). Objection was reviewed at trial (R. 95). The arrest was without a warrant (R. 32). An informer had talked to the arresting officer, a United States narcotics agent, about petitioner, stating that he was a narcotics wholesaler who had solicited the informer (a narcotics dealer) to buy from him (R. 29), such that the background of petitioner's alleged activity and circuit, including Houston, was known to the arresting officers. Petitioner called the informer about midnight, June 2nd, announcing his arrival after driving all night, and called again the next morning about 8:30 to arrange delivery. (R. 13, 14). The informer immediately notified the arresting officer. (R. 14). The informer met the arresting officer about one hour later at a prearranged meeting place in the vicinity of the point where the informer was to have met petitioner (R. 15), and the arresting officer and numerous other officers, in two cars, preceded the informer to a filling station adjacent to such point. (R. 16). The arresting officer did not pretend that he had not sufficient time to have procured a warrant, but only that his informer never positively told him petitioner had the stuff until after the informer had met petitioner (R. 31, 32). The informer testified he could state positively that petitioner had heroin only after he had sampled it. (R. 19). At the time of the arrest the informer had not told him petitioner was about to escape, but on the contrary that he was coming to the very filling station the officers were in to complete a delivery, and

the officers immediately proceeded to intercept petitioner on his way there and arrest and search him. (R. 32, 33). The foregoing record references are exclusively to the testimony as developed on motion to suppress, but on trial, over objection, the same testimony was developed in full detail by the prosecution.

B. *Venue.* The prosecution, by its witnesses, developed that petitioner had called the informer from Utah, Alabama, that he was on his way with the stuff (R. 54). That he called the informer on the night preceding the arrest and said he had been driving all night. The informer testified petitioner resided in the State of Louisiana (R. 67). Petitioner was arrested at a tourist court. (R. 94, 95). That petitioner and his co-defendant had come to Houston from New Orleans, arriving in Houston the night of the arrest, was confirmed by the testimony of petitioner's co-defendant, (R. 116) whom the jury, by their acquittal, believed.

C. *Unlawful Importation & Petitioner's Knowledge Thereof.* The prosecution, by its witness W. H. Crook, proved that heroin cannot be legally manufactured in this country, but that heroin found in this country is usually left over stock, heroin that was in drugstores left over after the act was passed forbidding its importation or manufacture.

## V

### Specifications of Errors to Be Urged

1. The Court below erred in overruling Petitioner's 4th Specification of Error in that Court, complaining of the action of the trial court in overruling his Motion to Suppress and admitting into evidence the results of a search of Petitioner incident to his arrest, for the arrest of petitioner

without warrant was unlawful for each of the following reasons:

(a) The arrest without warrant was unlawful under the laws of the State of Texas, when it occurred, and

(b) There having been ample time with little or no risk to have obtained a warrant, the arrest without warrant was unlawful.

2. The Court below erred in overruling Petitioner's 1st Specification of Error in that Court complaining of the want of any evidence to support a conviction under Count III of the indictment, since there was no evidence to support such conviction without relying upon a statute created presumption, the indulgence of which in this case violates due process of law.

3. The Court below erred in overruling Petitioner's 2nd Specification of Error in that Court complaining of the want of any evidence to support a conviction under Count II of the indictment, since there was no evidence to support such conviction without relying upon a statute created presumption, the indulgence of which in this case violates due process of law.

4. The Court below erred in overruling petitioner's 3rd Specification of Error in that Court, since an unlawful double punishment resulted in relying for proof of two separate crimes on statutory presumptions arising from a single innocent act, and the sentences should not have been made to run consecutively.

**Reasons for Granting the Writ**

Petitioner respectfully shows to this Honorable Court that a Writ of Certiorari should be issued directing the removal of the cause to this Court, because:

1. The per curiam opinion of the Court of Appeals, in overruling and holding without merit petitioner's specifica-

tions of error, forms no basis for a showing to this Court wherein the opinion within itself is erroneous. But substantial questions concerning violations of the constitutional rights of the accused were raised by his appeal, and the judgment against petitioner should have been reversed. It is a dangerous practice for a Court of Appeals to dispose of such contentions per curiam, for it obscures and lends comfort to practices designed to deprive the citizen of his constitutional safeguards. The Court of Appeals held, in effect, that an arrest by a Federal Narcotics Agent without a warrant was lawful, although not conforming to the laws of the State where the arrest occurred, and as such is in direct conflict with the opinion of this Honorable Court in *United States* v. *Di Re,* 332 U. S. 581, 92 L. Ed. 210. The Court of Appeals held, in effect, that an arrest without warrant by a Federal Narcotics officer was lawful where, after learning of the probable existence of facts justifying a warrant, and with ample time under the then circumstances to have procured a warrant with little or no risk by delay of losing opportunity, he makes no effort to obtain a warrant, and as such is in direct conflict with the holding of this Honorable Court in *Johnson* v. *United States,* 333 U. S. 10, 92 L. Ed. 436.

Such holding denied petitioner his constitutional guaranties of personal security and right of privacy derived under the 4th Amendment to the Constitution of the United States. It does not suffice for this Honorable Court to properly define certain constitutional limits of the power of federal law enforcement agencies to arrest without warrant, when such limits are disregarded by the agencies and by Federal District Courts and Courts of Appeal, but in order to secure to its citizens the safeguards of the 4th Amendment, the decisions of inferior courts denying an accused those safeguards must be reviewed and corrected by this

Court until the inferior courts and enforcement agencies become convinced.

2. The Court of Appeals held, in effect, that a legislative presumption may validly and constitutionally be indulged to supply all of the evidence of a material, essential element of a crime upon proof of the fact of possession, even when the prosecution has shown that such presumed facts did not, or at least probably did not, exist, and as such is in direct conflict with the holding of this Honorable Court in *Tot* v. *United States,* 319 U. S. 463, 87 L. Ed. 1519. The Court of Appeals, in so holding as to the presumption created by Sec. 174 of Title 21, U. S. Code, apparently relied on the holding of this Court in *Yee Hem* v. *United States,* 268 U. S. 178; 69 L. Ed. 904, wherein, under the facts in that case, it was held that the presumption could validly be made, and in so holding as to the presumption created by Sec. 2553 of Title 26, U. S. Internal Revenue Code, apparently relied on the holding of this Court in *Casey* v. *U. S.* 276, U. S. 413; 72 L. Ed. 632, wherein, under the facts in that case, it was held that the presumption could validly be made. In each such instance the Court of Appeals failed to observe that "due process" as applied to a legislative presumption sought to be indulged in any given case depends on the facts developed in that case, and that the *Yee Hem* and *Casey* cases, supra, do not broadly hold the legislative presumptions involved therein valid, but only that they might validly be indulged in those cases. Legislative presumptions are being extended, and the distinction which the Court of Appeals failed to observe is of such importance that it should be clearly drawn by this Honorable Court, so that law enforcement agencies, the prosecution and lower courts may keep in mind and preserve the need to afford due process of law to an accused in each case without relying on prior decisions as establishing the general validity of a legislative presumption.

3. The Court of Appeals held, in effect, that it was not unlawful double punishment to make sentences run consecutively upon conviction of two offenses, where proof of guilt in each depended exclusively on presumptions created by statute upon proof of a single common fact not criminal in itself, and in so holding was in direct conflict with *Copperthwaite* v. *United States,* 37 F.(2) 846. *Blockburger* v. *United States,* 284 U. S. 299, 76 L. Ed. 306, and *Michener* v. *United States,* 331 U. S. 790, 91 L. Ed. 1818, establish that a single act can be made the subject of more than one crime, but neither undertook to overrule the holding of *Copperthwaite* v. *United States,* supra, and the doctrine is onerous under those cases without extension, and a review of the question presented should be had that reaffirms the salutary limits set forth in the *Copperthwaite* case.

## Conclusion

Since the questions presented are of general importance and since the decision below conflicts with other decisions, the petition for writ of certiorari should be granted.

SAM R. MERRILL,
*Attorney for Petitioner,*

PHILIP D. BEALL, and
MERRILL & SCOTT,
*Of Counsel.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1951**

---

# No. 157

---

RAYMOND TERRIO,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

### I

### Opinions of the Courts Below

There was no opinion in the trial court, and the Court of Appeals affirmed in a *per curiam* opinion that is not reported. It is included in the Record at pages 154.

### II

### Jurisdiction

1. The Court of Appeals rendered judgment April 25, 1951, petition for rehearing was timely filed, and order

denying the petition for rehearing was dated May 30, 1951.

2. The jurisdiction of this Court is invoked under Sec. 1254 of the Judicial Code as amended June 25, 1948 (28 U. S. C. A. § 1254).

## III

### Statement of the Case

Petitioner and one James Jeffrey Brown were jointly indicted in the United States District Court for the Southern District of Texas on three counts alleging substantially, by Count I that they conspired with one another and others unknown to (a) purchase, sell, dispense and distribute heroin, not in the original stamped package, violating Sec. 2553(a), Title 26, U. S. Code, and (b) sell, barter, exchange and give away heroin, not in pursuance of a written order, violating Sec. 2554(a), Title 26, U. S. Code; by Count II that they did on or about June 3, 1950, in Houston, Harris County, Texas, unlawfully purchase from persons unknown a quantity of heroin, violating Sec. 2553(a), Title 26, U. S. Code; and by Count III that they did, on or about said date, fraudulently receive, conceal, buy, sell and facilitate the transportation of, after importation, a certain quantity of heroin, which they knew had been imported into the United States, contrary to law, violating Sec. 174 of Title 21, U. S. Code (R. 2-4).

Petitioner and his co-defendant were arrested about 11:00 A. M. on June 3, 1950, while in an automobile at a tourist court near the city limits of Houston, Harris County, Texas, (R. 34) and a search of the person of petitioner revealed that he had some heroin in his pants pocket. (R. 95). Motion to Suppress was timely filed (R. 5), and was overruled (R. 46) and objection renewed on trial (R. 95).

The prosecution developed that one Drury, an informer, had been solicited by petitioner for the sale of narcotics,

and the informer had informed W. H. Crook, Federal Narcotics Agent, of the background as known to him (R. 29). That petitioner had called the informer from Utah, Alabama, stating he was on his way to Houston with a supply of narcotics. (R. 54). That petitioner called the informer about 11:00 P. M. June 2, 1950, stating that he had just arrived in Houston after driving all night and would call in the morning. (R. 55, 56). That he called about 8.30 A. M. June 3rd, to make arrangements for a meeting for delivery of the narcotics, and the informer promptly called the Federal Narcotics Agents. (R. 56). The informer set a meeting time sufficient to allow him to dress, drive a considerable distance, and go by the bank enroute, and was substantially in charge (R. 22). Ample time was available to the arresting officer (W. H. Crook) to have procured a warrant, and he did not pretend to the contrary, but excused his failure on the alleged grounds that he had no grounds for a warrant at that time, that he had not been directly or positively informed that petitioner was then in possession of narcotics (R. 31, 32). The informer, in turn, testified that, because of the frequency with which simple powders were substituted for narcotics, he would be unable to positively state that any one was in possession of narcotics until he had tested it by taking a shot (he was an addict), (R. 19).

Petitioner was from Louisiana (R. 25), called the informer from Alabama to the effect that he was bringing narcotics there from to Houston, (R. 54) arrived in Houston late June 2, (R. 55, 56) and was arrested the morning of June 3rd. (R. 33).

Heroin was found on the person of petitioner. W. H. Crook, as a witness for the prosecution, stated that he did not know where petitioner got it or whether at that time it had been in a stamped package, (R. 107) that heroin found

in this country is usually left over, the stuff that was in stock in drug stores that was left over after the Act was passed. (R. 112, 113).

## IV

### Specification of Errors

1. The Court below erred in overruling Petitioner's 4th Specification of Error in that Court, complaining of the action of the trial court in overruling his Motion to Suppress and admitting into evidence the results of a search of Petitioner incident to his arrest, for the arrest of petitioner without warrant was unlawful for each of the following reasons:

(a) The arrest without warrant was unlawful under the laws of the State of Texas, where it occurred, and

(b) There having been ample time with little or no risk to have obtained a warrant, the arrest without warrant was unlawful.

2. The Court below erred in overruling Petitioner's 1st Specification of Error in that Court complaining of the want of any evidence to support a conviction under Count III of the indictment, since there was no evidence to support such conviction without relying upon a statute created presumption, the indulgence of which in this case violates due process of law.

3. The Court below erred in overruling Petitioner's 2nd Specification of Error in that Court complaining of want of any evidence to support a conviction under Count II of the indictment, since there was no evidence to support such conviction without relying upon a statute created presumption, the indulgence of which in this case violates due process of law.

4. The Court below erred in overruling Petitioner's 3rd Specification of Error in that Court, since an unlawful

double punishment resulted in relying for proof of two separate crimes on statutory presumptions arising from a single innocent act, and the sentences should not have been made to run consecutively.

## V

## Argument

Summary:

1. *The Unlawful Arrest.* Petitioner contends that his arrest without warrant was unlawful, and the evidence procured thereby should have been suppressed and was erroneously admitted into evidence against him. The only provision of the laws of Texas authorizing an arrest without warrant not clearly and patently inapplicable is Article 215 of Title 5 of the Code of Criminal Procedure of Texas, reading as follows:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused."

In this case the informer had not informed the officer that a felony had been committed and that the offender was about to escape. On the contrary he informed the officer that petitioner was coming to the filling station where the officers then were intending to complete a felonious transaction, and at the time of the arrest no grounds for arrest without warrant existed. The arrest without warrant was unlawful for the further reason that, after the arresting officer, fully apprised of the situation by the informer, was told of the impending meeting between the informer and petitioner, ample time existed without risk of loss of op-

portunity, to have procurred a warrant for petitioner's arrest.

2. *No Evidence and Due Process.* Count II of the indictment charging petitioner with the purchase in Houston, Harris County, Texas, of heroin was based on Sec. 2553(a) of Title 26, U. S. Code, prohibiting the purchase of certain drugs except in the original stamped package, and providing "and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found."

Count III of the indictment, charging petitioner with knowingly receiving, concealing, etc., after importation, certain heroin, which he knew had been imported contrary to law, was based on Sec. 174 of Title 21, U. S. Code, making such conduct unlawful and providing "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Since there was no evidence of purchase by petitioner in Houston, Harris County, Texas, or elsewhere in such state, and no evidence that the drug was unlawfully imported or that he knew thereof, the convictions can stand only by indulging the presumptions created by the quoted portions of the foregoing statutes.

Petitioner contends that when the prosecution developed that he was a non-resident of Texas who had brought the drug in from another state, a denial of due process of law obtains in relying on the presumption created by Sec. 2553(a) to prove purchase in Houston, Harris County, Texas, as charged, and that when the prosecution developed that heroin found in this country is usually left-over stock

not unlawfully imported, a denial of due process of law obtains in relying on the presumption created by Sec. 174 to prove unlawful importation and petitioner's knowledge thereof.

3. *Double Punishment.* The Congress of the United States has not undertaken to make unlawful the possession of narcotic drugs. It has made unlawful the purchase of such drugs not in or from stamped, tax-paid, packages as a violation of the revenue laws and has prohibited the importation, except as permitted by regulation, thereof, and the receipt, concealment, etc., thereof, after unlawful importation, with knowledge thereof. Obviously, the two crimes are not necessarily related, and different facts are required to prove them. Concededly, a single act can be the subject of two crimes. Petitioner contends that where a single fact, not in itself unlawful, is shown, the possession, proof of the two crimes may not both be bottomed thereon by indulging the separate, statutory presumptions, and an unlawful, double punishment results if sentences on two such convictions are made consecutive.

## Statutes Involved

*Sect. 2553(a) of Title 26 USCA:* "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax."

*Sect. 174 of Title 21 USCA:* "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

*Sect. 181 of Title 21 USCA:* "All smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported contrary to law, and the burden of proof shall be on the claimant or the accused to rebut such presumption."

*Rule 18, Federal Rules of Criminal Procedure:* "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed."

*Article 212, Code of Criminal Procedure of Texas:* "A peace officer or any other person, may, without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony, or as an 'offense against the public peace.' "

*Article 215, Code of Criminal Procedure of Texas:* "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about *the* escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused."

*Article 325, Code of Criminal Procedure of Texas:* "All persons have a right to prevent the consequences of theft by seizing any personal property which has been stolen, and bringing it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the property to be stolen, and the seizure must be openly made and the proceedings had without delay."

Constitutional Provisions Invoked:

*Article III, Sec. 2, cl. 3:* "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

*Amendment IV:* "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

*Amendment VI:* "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

*Amendment V:* "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

*The Unlawful Arrest*

From the foregoing articles of the Code of Criminal Procedure of Texas, which, with Article 213 and Article 214 not in any event material hereto, govern the law of arrest without warrant, it is apparent that the arrest of petitioner without warrant was not authorized thereunder. Article 325 applies only to stolen goods. Article 212 does not apply, for an offense occurs without view of an officer when his senses afford him knowledge thereof.

*Clark* v. *State,* 117 Cr. R. 153, 35 S. W. (2) 420; 4 Texas Jurisprudence 743, Arrest § 5;
*Heath* v. *Boyd,* 175 S. W. (2) 214.

The arresting officer acted solely on information furnished by the informer. But Article 215 cannot be resorted to as authorizing the arrest for there was no information that the alleged offender was about to escape, but on the contrary, that he was coming to the filling station where the officer then was to complete a sale. An arrest without warrant by Federal officers is lawful only if it would be such under the laws of the State where the arrest occurred.

*United States* v. *Di Re,* 332 U. S. 581, 92 L. Ed. 210;
*Johnson* v. *United States,* 331 U. S. 10, 92 L. Ed. 436.

It seems clear that the arrest was unlawful under the laws of the State of Texas.

But even if it had been otherwise lawful, the arrest of petitioner was unlawful for the reason that the arresting

officer had ample time to have procured a warrant without risk of losing opportunity. The informer was in substantial charge of the situation. By 8:30 in the morning the officer was apprised of the entire situation. In fact, he didn't even pretend he didn't have ample time to have procured a warrant, but sought to justify his failure on the ground that he had not been informed positively that petitioner was then in possession of narcotics. His addict informer, in turn testified that before he could so inform the arresting officer he would have to test the narcotics on himself, for frequently innocent powders were passed for narcotics. So that notwithstanding the fact that the arresting officer had been informed of petitioner's alleged background as a narcotics wholesaler, that he had come to Houston with a stock to complete a sale to the informer, whose business he had solicited, and an appointment was made for their meeting, and prior to the time for such meeting he could readily go before a magistrate to procure a warrant, he did not. He didn't know petitioner had the stuff. If the argument of the arresting officer is sound, the Government will need a large supply of addict informers. Patently, the real concern of the arresting officer was not that he hadn't ample information that a crime had been committed, but only that the evidence might be missing. But the very purpose of warrants of arrest and search is to secure to the Government in a lawful manner the physical evidences of crimes, and to disregard the constitutional requirements therefor is to wield a tyrant's tool. The evidence should have been suppressed, and, as the evidence so procured is the only evidence supporting a conviction on Counts II and III, a reversal must follow.

*No Evidence*

Petitioner's 2nd and 3rd Specification of Error, are governed by the same fundamental principles of due process

of law, and have been grouped for argument accordingly. Petitioner contends as to each count that to indulge the presumption which Sect. 174 and Sect. 2553(a), respectively, create from the fact of possession of narcotics violates due process in this case. Of course, if petitioner is correct on his 1st Specification of Error, and the fact of possession should have been suppressed, then the considerations hereof are of secondary importance, but since evidence of possession was admitted, and conviction on Counts II and III rest exclusively on such possession, and the presumptions each statute creates therefrom, the convictions can stand only if such presumptions may be validly indulged in this case, for possession itself is not a crime.

Section 174 makes a crime of unlawful importation of narcotics, and, generally, of knowingly dealing in narcotics after unlawful importation, and provides "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of *the* narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." By ordinary rules of construction, the use of "the", *italicized* for emphasis by petitioner, refers to a narcotic drug unlawfully imported, such that conviction could rest on possession of a narcotic drug shown to have been unlawfully imported, the presumption supplying the element of the accused's knowledge. "*The* is a definitive adjective; a demonstrative word used especially before a noun to particularize its meaning; the article which designates one particular from a class or number, disassociating it from others of the same class." 62 Corpus Juris. 834. Certainly the strict rules applicable to the construction of a criminal statute should require such an interpretation of the section. But in *Howard, et al.* v. *U. S.*, 75 F. (2) 562, the Seventh Circuit rejected such con-

struction, relying on *Yee Hem* v. *U. S.*, 268 U. S. 178, 69 L. Ed. 904, and other cases cited. The *Yee Hem* case, however, was a smoking opium case. Section 181, hereinabove quoted, provides that all smoking opium found in the United States shall be rebuttably presumed to have been imported contrary to law. In the *Yee Hem* case the Court first relied on Sect. 181, found that the presumption of unlawful importation contained therein was valid, and relied on the presumption of Sect. 174 only to supply the element of knowledge. But subsequent Courts of Appeals, purporting to rely on the *Yee Hem* case, applied the doctrine of presumed guilt on possession to other narcotics than smoking opium.

*United States* v. *Moe Liss*, 105 F. (2) 144;
*Hood* v. *United States*, 78 F. (2) 150.

In the latter case the Court reluctantly so held, but cited the *Yee Hem* case as controlling. It is submitted that such decisions constitute an unwarranted extension of the doctrine of the *Yee Hem* case, and that there is no evidence of unlawful importation in the instant case. The prosecution proved that heroin found in this country is not ordinarily unlawfully imported. The prosecution proved that it is usually left over stock, stuff that was in this country prior to the enactment prohibiting its importation. To indulge a presumption of unlawful importation of heroin (even if Sect. 174 authorizes it) violates due process, for there is no reasonable connection between the facts presumed and the facts proved.

*Tot* v. *United States*, 319 U. S. 463, 87 L. Ed. 1519.

The conviction on Count III should be reversed for want of any evidence that the heroin found in petitioner's possession had been unlawfully imported, for a presumption will not be indulged in proof thereof when a violation of the

accused's constitutional rights under the 5th amendment would result.

Section 2553(a), after prohibiting the purchase of narcotics save in or from stamped packages, provides . . . "and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found." The prosecution showed possession, and showed further that the accused was a Louisiana resident, who had come from Alabama with the narcotics, arriving the night of June 2nd, his arrest occurring at a tourist court about 11:00 A.M. June 3rd.

In *Casey* v. *United States,* 276 U. S. 413, 72 L. Ed. 632, one Casey was shown to have had possession of unstamped morphine, and further, that he was a life-long resident of the city of Seattle, when he was charged, had stated he had more to his prospective purchaser, and a few hours later made a delivery, all in Seattle. The Court held that under those facts the presumption of purchase in Seattle was justifiable. The *Casey* case has been the authority for a number of Courts of Appeals decisions extending its application to cases where there were few or no collaterial facts and circumstances tending to show acquisition within the district and State where charged.

*Acuna* v. *United States,* 74 F. (2) 359;
*Frazier* v. *United States,* 163 F. (2) 817.

In the latter case, the accused testified to acquisition elsewhere, but the Court in affirming a conviction, held that the jury was free to disbelieve the accused, such that the record was the same as if possession only had been shown. In the instant case the prosecution showed that petitioner had acquired the heroin elsewhere (or at least that he in all probability had), and are bound thereby, such that from the facts proved by the prosecution there

is no reasonable basis for a presumption that petitioner purchased the heroin in Houston, Harris County, Texas (or elsewhere within the State and district). To indulge such a presumption here violates due process. *Tot* v. *United States, supra.* The constitutional guaranties of petitioner embodied in Article III, Section 2, paragraph 3 and in Amendment VI, require proof of venue as an essential element of the Government's case, and the total want thereof existing here, demand a reversal.

*Clyatt* v. *United States,* 197 U. S. 207, 49 L. Ed. 726;
*Edenfield* v. *United States,* 112 F. (2) 931.

*Double Punishment*

The judgment below was erroneous in any event. Even if the fact of possession (which should have been suppressed) were properly in evidence, and even if the presumptions of Sects. 174 and 2553(a), supra, might validly be indulged, still the presumptive device may not be twice used on the single fact of possession to make proof of two separate crimes, and reversible error follows when the sentences are made consecutive.

It is well established that a single act may be the subject of two crimes.

*Blockburger* v. *United States,* 284 U. S. 299, 76 L. Ed. 306;
*Michener* v. *United States,* 331 U. S. 790, 91 L. Ed. 1818.

In the *Blockburger* case direct proof was made of a sale of narcotics (1) not from a stamped package and (2) not pursuant to a written order, such that direct proof of the violation of the two sections of the law was had from the single sale. In the *Michener* case, the question was whether the possession necessarily incident to manufacture was sufficiently possession apart therefrom that the

accused could be convicted of possession with intent to defraud the United States, as well as manufacture with intent to defraud the United States. But both such possession and manufacture were proved. The doctrine, however, is onerous, and should not be extended. And where, as in the instant case, the single, lawful fact of possession is shown, to indulge presumptions of fact therefrom justifying a conviction under Count II and at the same time indulge presumptions of fact therefrom justifying a conviction under Count III, so violates the requirement of essential fairness that to make sentences run consecutively constitutes unlawful double punishment.

*Copperthwaite* v. *United States,* 37 F. (2) 846.

This narrower question has not often been before the Court, but the *Copperthwaite* case, supra, has never been expressly overruled, and provides a salutary rule.

In *Bruno* v. *United States,* 164 F. (2) 693, while the question was not really in issue, the opinion of the Court undertook to criticize the *Copperthwaite* case, and in a separate concurring opinion, Denman, J., nicely marks the distinction and its application where actually in point. It was reversible error to make the sentences run consecutively.

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

SAM R. MERRILL,
*Attorney for Petitioner.*

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 3 |
| Statement | 5 |
| Argument | 10 |
| Conclusion | 19 |


## CITATIONS

CASES:


| | |
|---|---|
| *Agnello* v. *United States*, 269 U. S. 20 | 10 |
| *Blockburger* v. *United States*, 284 U. S. 299 | 18, 19 |
| *Borgfeldt* v. *United States*, 67 F. 2d 967 | 15 |
| *Brinegar* v. *United States*, 338 U. S. 160 | 11 |
| *Bruno* v. *United States*, 164 F. 2d 693, certiorari denied, 333 U. S. 832 | 18 |
| *Carroll* v. *United States*, 267 U. S. 132 | 11 |
| *Casey* v. *United States*, 276 U. S. 413 | 16 |
| *Colletti* v. *United States*, 53 F. 2d 1017, certiorari denied, 285 U. S. 559 | 15 |
| *Copperthwaite* v. *United States*, 37 F. 2d 846 | 15, 18 |
| *Corollo* v. *Dutton*, 63 F. 2d 7 | 18 |
| *Delaney* v. *United States*, 263 U. S. 586 | 16, 18 |
| *Gowling* v. *United States*, 64 F. 2d 796 | 19 |
| *Hagner* v. *United States*, 54 F. 2d 446, affirmed, 285 U. S. 427 | 17 |
| *Harris* v. *United States*, 331 U. S. 145 | 10 |
| *Howard* v. *United States*, 75 F. 2d 562, certiorari denied, 295 U. S. 740 | 15 |
| *Johnson* v. *United States*, 333 U. S. 10 | 11 |
| *Mahaffey* v. *Hudspeth*, 128 F. 2d 940, certiorari denied, 317 U. S. 666 | 17 |
| *Mills* v. *Aderhold*, 110 F. 2d 765 | 18 |
| *Morlen* v. *United States*, 13 F. 2d 625 | 16 |
| *Northern* v. *State*, 216 S. W. 2d 192 | 11 |
| *Rodd* v. *United States*, 165 F. 2d 54, certiorari denied, 334 U. S. 815 | 17 |
| *Rosenberg* v. *United States*, 13 F. 2d 369 | 15 |

Page

*Silverman* v. *United States*, 59 F. 2d 636 ---------- 18
*Sorrentino* v. *United States*, 163 F. 2d 627 ---------- 18
*United States* v. *Di Re*, 332 U. S. 581 ---------- 11
*United States* v .*Haberkorn*, 149 F. 2d 720 ---------- 11
*United States* v. *Johnson*, 319 U. S. 503 ----------16, 18
*United States* v. *Jones*, 174 F. 2d 746 ---------- 17
*United States* v. *Moe Liss*, 105 F. 2d 144 ---------- 15
*United States* v. *Rabinowitz*, 339 U. S. 56 ----------10, 12
*Vogt* v. *United States*, 156 F. 2d 308 ---------- 18
*Ware* v. *State*, 207 S. W. 2d 868 ---------- 11
*Warren* v. *State*, 94 S. W. 2d 462 ---------- 11
*White* v. *United States*, 16 F. 2d 870 ---------- 15
*Yee Hem* v. *United States*, 268 U. S. 178 ----------14, 15

STATUTES:

Act of June 7, 1924, c. 352, 43 Stat. 657 ---------- 9
Internal Revenue Code (26 U.S.C. 2553(a)) ---------- 3
Narcotic Drugs Import and Export Act, May 26, 1922, c. 202, 42 Stat. 596, as amended:
Sec. 1(a) [21 U.S.C. 171] ----------3, 13
Sec. 2(b) [21 U.S.C. 173] ----------3, 13
Sec. 2(c) [21 U.S.C. 174] ---------- 4
Sec. 2(f) [21 U.S.C. 174] ----------4, 12, 16
5 Texas Code of Criminal Procedure, Article 215 ----------4, 10

# In the Supreme Court of the United States

OCTOBER TERM, 1951

---

No. 157

---

RAYMOND TERRIO, PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the Court of Appeals (R. 154) is not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1951 (R. 154), and a petition for rehearing was denied on May 30, 1951 (R. 156). The petition for a writ of certiorari was filed

on June 29, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

**QUESTIONS PRESENTED**

1. Whether an arrest without a warrant was justified on the particular facts of the case where a Texas statute made the legality of such an arrest dependent on whether the accused was about to escape.

2. Whether, notwithstanding the existence of a prima facie case made out under Section 2(f) of the Narcotic Drugs Import and Export Act by proof of the possession of narcotics, it was necessary for the Government to establish by independent proof that the narcotics had been imported contrary to law.

3. Whether, notwithstanding the prima facie case made out under Section 2553(a) of the Internal Revenue Code by proof of the possession of unstamped packages of drugs, it was necessary for the government to establish venue by proof that the drugs had been purchased in a particular judicial district.

4. Whether petitioner was twice penalized for the same offense because possession of the same narcotics was involved in convictions on two counts,

one under the Internal Revenue Code and the other under the Narcotic Drugs Import and Export Act.

### STATUTES INVOLVED

Section 2553(a) of the Internal Revenue Code (26 U. S. C. 2553(a)) provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *.

The pertinent provisions of the Narcotic Drugs Import and Export Act, May 26, 1922, c. 202, 42 Stat. 596, as amended, are:

> Sec. 1. (a) [21 U. S. C. 171] The term "narcotic drug" means opium, coca leaves, cocaine, * * * or any salt, derivative, or preparation of opium, coca leaves, cocaine * * *
>
> Sec. 2 (b) [21 U. S. C. 173] That it is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics to be necessary to

provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. * * *

(c) [21 U. S. C. 174] That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years.

* * * * *

(f) [21 U. S. C. 174] Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury.

Article 215 of 5 Texas Code of Criminal Procedure provides:

Where it is shown by satisfactory proof to a peace officer, upon the representation of a

credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

## STATEMENT

A three-count indictment filed in September 1950 (R. 2) in the United States District Court for the Southern District of Texas (R. 1) charged petitioner and James J. Brown with unlawfully conspiring to purchase heroin not in the original stamped package in violation of Section 2553(a) of the Internal Revenue Code and to sell heroin not in pursuance of written orders from persons to whom such heroin was to be sold, in violation of Section 2554(a) of the Internal Revenue Code (count 1, R. 2-3). It also charged them with knowingly purchasing approximately 2625 grains of heroin not in or from the original stamped package, in violation of Section 2553(a) of the Internal Revenue Code (count 2, R. 3-4), and with receiving, concealing, buying, selling and facilitating the transportation and concealment of such heroin, which they knew had been illegally imported into the United States, in violation of 21 U. S. C. 174 (count 3, R. 4).

Prior to trial petitioner filed a motion, which was denied (R. 46), to suppress evidence which he al-

leged was seized as a result of an illegal arrest and search (R. 5-7). At a hearing on the motion and at the trial, the following undisputed evidence was adduced:

During the night of June 2, 1950 (R. 13, 55), after several telephone calls on previous days from petitioner from Alabama and Mississippi that he was on his way with the "stuff" (R. 54-55), informer William Drury of Houston, Texas received a call from petitioner[1] who told him that he had "just gotten in," that one of his cars which was "loaded with stuff" had broken down and that he would call him in the morning after he found a place to stay (R. 24, 56). The following morning about 8:30 a. m. petitioner advised Drury telephonically that "he had the stuff and was ready to deal" and arranged to meet Drury, after the banks opened, in a cafe in front of Helms Tourist Court (R. 14, 24, 25, 26, 56). After calling Federal Narcotic Agent Crook and meeting Crook and several members of the Houston Police Department about 10:00 a. m. at a pre-arranged spot, and advising them of his arrangements to meet petitioner, whom

[1] Drury had met petitioner several weeks prior thereto and had previously discussed the purchase of narcotics for his own use from petitioner when he came through Houston. On these occasions Drury advised petitioner that he would not buy the narcotics without first sampling them. (R. 25, 26, 51, 53, 61.)

he at that time knew only as Joe, Drury proceeded to the cafe in his own car, but with the officers going along with him in two other cars (R. 14-23, 28-32, 39, 57-58, 92-93). There he met petitioner who got into his car. After driving several hundred yards from the tourist camp, during which time Drury thought that petitioner was taking him "to where the stuff was," petitioner advised Drury to return to the tourist camp and drive to the back cabin. (R. 18, 31-32, 39, 58, 70-72, 93.) Meanwhile, the car carrying Crook, who saw petitioner for the first time when he met Drury, pulled into the service station located about a block from the tourist camp to observe Drury. The other car, containing the other officers, cruised around the area. (R. 32, 37, 39, 93.)

At the cabin, while Drury prepared his hypodermic needle to test the narcotics before purchasing them, petitioner went to the door and motioned to someone who came to the front door. When petitioner returned from the door he had a package from which Drury extracted a "shot" which petitioner prepared for Drury. While Drury was taking the shot, petitioner returned the package to Brown, who had come into the cabin and left immediately. (R. 18-19, 59-60, 62-64.) Drury then advised petitioner that he "thought the stuff was pretty good" and that he would purchase some, but

that since he had been recently hijacked he did not have the money with him. However, he said that he would call his wife from the cafe and she would bring it immediately. Petitioner, however, urged against Drury's going to the cafe because it "might arouse suspicion". He suggested instead that Drury call his wife from the service station and that he would bring "the stuff" to the service station. (R. 19, 60, 80.) When Drury arrived at the service station, he told the officers that petitioner had "the stuff," that "they" were coming in a car with it and that he was to meet them at the station (R. 19, 33, 39-40, 41, 84, 94). Immediately upon the receipt of this information, the officers drove to the tourist camp and as they drove into the main driveway about 11:00 a. m. they stopped an automobile coming out driven by petitioner. Without an arrest or search warrant they ordered petitioner and his companion Brown to get out and arrested and searched them (R. 29, 33, 34, 45, 94-95). In petitioner's trouser pocket, they found six envelopes containing about six ounces of heroin not in an original stamped package and which was the subject of the motion to suppress (R. 45, 95-96, 97, 106-108). The heroin was admitted in evidence over petitioner's objection (R. 95).

Narcotic Agent Crook testified that prior to the arrest on June 3, 1950, Drury had informed him

that he had a "connection" in New Orleans by the name of Joe who was a narcotic dealer who telephoned him long distance several times from Alabama and Mississippi in an effort to sell him narcotics and who came through Houston as part of his sales trip (R. 27-36). He further testified that he did not have enough information upon which to get any warrants until Drury met him at the service station just a few minutes prior to the arrest and told him that petitioner was coming with the heroin (R. 29, 32, 36). He also testified that since the passage of the statute in 1926 [2] prohibiting the manufacture of heroin in this country, heroin found here "usually comes from" stocks that were unused at the time of the passage of the statute (R. 112-113).

Drury testified that he was not certain that petitioner had any heroin or where it was until petitioner allowed him to sample it in the cabin (R. 19, 22, 24-25).

The jury found petitioner not guilty on count one and guilty on counts two and three (R. 150). The court sentenced him to three years' imprisonment on count 2 and to three years' imprisonment and a fine of $2,000 on count three,[3] the imprisonment

---

[2] The manufacture of heroin was prohibited by a law enacted on June 7, 1924, c. 352, 43 Stat. 657.

[3] Brown was acquitted on all three counts (R. 151).

sentences to run consecutively. The payment of the fine was suspended for a period of five years, the suspension to begin at the expiration of the sentences to be served on counts two and three. (R. 151-152.) The Court of Appeals affirmed the judgment of conviction (R. 154).

**ARGUMENT**

1. We do not understand petitioner to challenge the legality of the search of his person and the seizure of the narcotics from his pockets if it was incident to a lawful arrest. Clearly such an argument, if urged here, would avail petitioner nothing. *United States* v. *Rabinowitz,* 339 U. S. 56, 60; *Harris* v. *United States,* 331 U. S. 145, 150-151; *Agnello* v. *United States,* 269 U. S. 20. But he attacks (Pet. 5-8, 15-16, 20-21) the validity of the underlying arrest on the dual grounds that being without a warrant it was not authorized under the laws of Texas and that the arresting officers had ample time to procure a warrant for arrest.

The first basis of petitioner's attack upon the arrest is without merit. Article 215 of the Texas Code of Criminal Procedure (*supra,* pp. 4-5), provides for an arrest without a warrant "[w]here it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender

is about to escape.'"[4] *Northern* v. *State* (Tex. Cr. App.), 216 S. W. 2d 192; *Ware* v. *State,* (Tex. Cr. App.), 207 S. W. 2d 868; *Warren* v. *State,* (Tex. Cr. App.), 94 S. W. 2d 462. In the instant case, the undisputed facts establish that just a few minutes before the arrest Narcotic Agent Crook and his companions learned for the first time that petitioner had heroin in his possession. This fact coupled with the earlier identification of petitioner by Drury as the narcotic dealer clearly constituted satisfactory proof under the Texas statute that a felony had been committed by petitioner.

Whether or not the arresting officers were justified in believing that the petitioner was about to escape, depends on the facts of the particular case. Both courts below were apparently satisfied that the apprehension was not unreasonable. Certainly the facts that petitioner was a transient traveling by automobile and staying in a tourist cabin (cf. *United States* v. *Haberkorn,* 149 F. 2d 720 (C. A. 2)); that petitioner had shown fear of arousing suspicion (R. 60); and that he was in the act of driving out of the tourist court when he was stopped by the officers (Cf. *Brinegar* v. *United*

[4] As petitioner contends, in the absence of an applicable federal statute, state law determines the validity of arrests without a warrant. *Johnson* v. *United States,* 333 U. S. 10, 15; *United States* v. *Di Re,* 332 U. S. 581.

*States,* 338 U. S. 160, 174; *Carroll* v. *United States,* 267 U. S. 132, 153) lend support to this view. Petitioner argues that the officers should have assumed that he would have obligingly remained accessible until a warrant could have been obtained. There is no reason why this Court should review this contested question of fact.

Likewise without merit is the second ground of petitioner's attack upon the validity of the arrest, that the officers had ample time to procure a warrant of arrest. It is clear from the foregoing discussion justifying the arrest under the Texas statute that there was no time within which to secure a warrant. When the officers first learned that petitioner had heroin, an immediate arrest was necessary to avoid escape. Aside from the importance of this facet of the case under the Texas statute, the Constitution does not, as petitioner suggests (Pet. 20-21), require a warrant in all cases where there is time to procure one. *United States* v. *Rabinowitz, supra,* 339 U. S. at 64.

2. Section 2(f) of the Narcotic Drugs Import and Export Act provides:

> Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury.

Petitioner argues (Pet. 21-23) that the use of the word "the" before the words 'narcotic drug" indicates that it was the congressional intent to limit the presumption to cases where the narcotic drug is shown to have been unlawfully imported and that therefore the Government was required to introduce independent proof that the drug was imported contrary to law. And here, he believes, not only did the Government fail to introduce such proof, but what proof it introduced showed the contrary—that the drug had not been unlawfully imported into the United States. We submit that this is a strained construction of the statute.

Section 1(a) provides that the term "narcotic drug" means 'opium, coca leaves, cocaine, * * * or any salt, derivative, or preparation of opium, coca leaves, [or] cocaine" (*supra,* p. 3). Section 2(b) provides that it is unlawful to import any narcotic drug into the United States, except that such amounts of crude opium and coca leaves as the Federal Narcotics Control Board finds to be necessary to provide for medical and legitimate uses only may be brought in under such regulations as the board shall prescribe. It further provides, however, that "no crude opium may be imported or brought in for the purpose of manufacturing heroin," the drug involved in the instant case.

Considering these provisions as a whole, we think it is evident that it was the intention of Congress

to place upon a person found in the possession of any of the narcotic drugs specified in the statute the burden of showing that it came into his possession lawfully, and that the presumption created by the statute dispenses with the necessity of independent proof by the Government that the drug was unlawfully imported. This would seem to be particularly true in the case of heroin in view of the prohibition against the bringing in of opium for the purpose of manufacturing heroin.

This view as to the effect of the presumption created by Section 2(f) is supported by the decision in *Yee Hem* v. *United States,* 268 U. S. 178, where the Court said with reference to it (p. 184):

> Nor do we think the further provision, that possession of such opium in the absence of a satisfactory explanation shall create a presumption of guilt, is "so unreasonable as to be a purely arbitrary mandate." By universal sentiment, and settled policy as evidenced by state and local legislation for more than half a century, opium is an illegitimate commodity, the use of which, except as a medicinal agent, is rigidly condemned. Legitimate possession, unless for medicinal use, is so highly improbable that to say to any person who obtains the outlawed commodity, "since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and

> be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it," is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress.

While it is true, as petitioner claims (Pet. 23), that the *Yee Hem* case dealt with smoking opium and that Section 3 of the Act provided that on and after July 1, 1913, "all smoking opium * * * found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the * * * accused to rebut such presumption," the above quotation from the opinion makes it clear that the Court was considering only the presumption contained in Section 2(f).

That the holding in the *Yee Hem* case is controlling not only with respect to smoking opium but other narcotic drugs has been uniformly recognized by decisions in a number of the Courts of Appeals. *United States* v. *Moe Liss,* 105 F. 2d 144 (C. A. 2); *Howard* v. *United States,* 75 F. 2d 562 (C. A. 7), certiorari denied, 295 U. S. 740; *Borgfeldt* v. *United States,* 67 F. 2d 967, 968-969 (C. A. 9); *Colletti* v. *United States,* 53 F. 2d 1017 (C. A. 6), certiorari denied, 285 U. S. 559; *Copperthwaite* v. *United States,* 37 F. 2d 846 (C. A. 6); *White* v. *United States,* 16 F. 2d 870 (C. A. 9); *Rosenberg* v.

*United States,* 13 F. 2d 369 (C. A. 9); *Morlen* v. *United States,* 13 F. 2d 625, 626 (C. A. 9).

In addition, we believe that petitioner's further contention that, if the presumption under Section 2(f) covers unlawful importation as well as knowledge thereof, it is unconstitutional (Pet. 23) is completely answered by the quotation above from the *Yee Hem* case, *supra.*

His final argument (Pet. 23) against the application of the presumption of illegal importation flowing from possession here is that it was rebutted by Narcotic Agent Crook's testimony (*supra,* p. 9), that heroin found in this country "usually comes" from stock left over from the time its manufacture was prohibited. This general statement without any direct evidence on the question is hardly sufficient to overcome the presumption of guilt flowing from possession, particularly when the manufacture of heroin was prohibited in 1924. It is reasonable to assume that heroin found here twenty-six years later was unlawfully imported. In any event, this question of fact was submitted to the jury (R. 144-145), whose findings are not lightly disturbed by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.

3. Petitioner, while recognizing that this Court in *Casey* v. *United States,* 276 U. S. 413, has held

that the presumption arising from possession contained in Section 2553(a) of the Internal Revenue Code extends also to venue (Pet. 8, 24), contends (Pet. 24-25) that venue as to him was not shown because the Government's evidence showing that on the evening prior to the arrest, petitioner had just arrived in Houston, Texas, from Alabama and Mississippi, proved that "in all probability" he acquired the heroin outside of the Southern District of Texas. Assuming *arguendo* that this question of venue is still open to petitioner in spite of the fact that he did not raise it in the trial court in any form,[5] we submit that this evidence does not rebut the presumption that the purchase occurred in the same place where possession was discovered. There was no direct evidence on this question and the testimony, on which petitioner relies to support venue outside of the Southern District of Texas, was submitted to the jury which found against petitioner. The Court of Appeals found that the

---

[5] As a general rule, any objection to venue is waived by going to trial on the merits. *Rodd* v. *United States*, 165 F. 2d 54, 56 (C. A. 9), certiorari denied, 334 U. S. 815; *Mahaffey* v. *Hudspeth*, 128 F. 2d 940 (C. A. 10), certiorari denied, 317 U. S. 666; *Hagner* v. *United States*, 54 F. 2d 446 (C. A. D. C.), affirmed on other grounds, 285 U. S. 427. Even *United States* v. *Jones*, 174 F. 2d 746, 748 (C. A. 7), which held that the question of venue can be saved by a general motion for acquittal challenging the sufficiency of the evidence does not avail petitioner since no such motion was made here as to count two.

evidence supported the verdict (R. 154). Petitioner has made no showing which would justify this Court in reexamining the evidence. *United States* v. *Johnson, supra; Delaney* v. *United States, supra.*

4. Petitioner's final argument (Pet. 17, 25-26) is that he is being punished twice for one act in that, although he was found guilty of two separate offenses, his guilt for both offenses was proved merely by his possession of the same heroin. We submit that petitioner by admitting (Pet. 17) that Section 2(f) of the Narcotic Drugs Import and Export Act and Section 2553(a) of the Internal Revenue Code define two separate and distinct offenses has answered his own argument that his sentence under both counts constitute double punishment. See *Blockburger* v. *United States,* 284 U. S. 299. These sections by providing that proof of possession of a narcotic drug alone makes a prima facie case under each statute do not define the substantive offenses, but as the Courts of Appeals uniformly agree merely state rules of evidence. The presumption which is raised under each statute is of the different facts which are necessary to establish a violation under each section. *Bruno* v. *United States,* 164 F. 2d 693 (C. A. 9), certiorari denied, 333 U. S. 832; *Sorrentino* v. *United States,* 163 F. 2d 627 (C. A. 9); *Vogt* v. *United States,* 156 F. 2d 308 (C. A. 5); *Mills* v. *Aderhold,* 110 F. 2d 765 (C. A. 10); *Corollo* v. *Dutton,* 63 F. 2d 7 (C. A. 5); *Silverman* v. *United*

*States,* 59 F. 2d 636 (C. A. 1). As to each offense a jury must consider not only the fact of possession, but also all evidence tending to rebut its application to establish the separate elements of the two offenses. Despite petitioner's argument to the contrary, the decision of the Sixth Circuit Court of Appeals in *Copperthwaite* v. *United States,* 37 F. 2d 846, upon which he relies was overruled by its later decision in *Gowling* v. *United States,* 64 F. 2d 796. See also *Blockburger* v. *United States, supra.*

**CONCLUSION**

The decision below is correct and there is involved no conflict of decisions or any important question of federal law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
*Solicitor General.*

JAMES M. MCINERNEY,
*Assistant Attorney General.*

JOHN F. DAVIS,
*Special Assistant to the Attorney General.*

FELICIA H. DUBROVSKY,
*Attorney.*

AUGUST 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE 1951—962287/P.O. 104